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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV - 5 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 90 of the Commission's) PR Docket No. 93-144
Rules to Facilitate Future Development of) RM-8117, RM-8030,
SMR Systems in the 800 MHz Frequency Band) RM-8029

and

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding) PP Docket No. 93-253
800 MHz SMR)

To: The Commission

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COMMENTS

Thomas Luczak ("Luczak"), by his attorneys, hereby respectfully submits his Comments regarding the above-captioned matter. In support of his position, Luczak shows the following:

Luczak is the licensee and operator of a five channel trunked Specialized Mobile Radio System in Ventura, California. Luczak has been a provider of analog SMR services for a number of years, and his system provides radio communications services to hundreds of end users in the Southern California area. The outcome of this proposed rule making will have a direct impact on Luczak and his business, and, therefore, Luczak's interest in this proceeding is clearly established. Moreover, as the proposed amendments of Part 90 of the Commission's Rules would have a stifling effect upon the

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growth of Luczak's system in the SMR marketplace, Luczak takes this opportunity to voice his opposition to the adoption and implementation of a new SMR licensing system.

If It Ain't Broke, Don't Fix It

The SMR industry has matured dramatically since the inception of SMR licensing and regulation more than twenty years ago. SMR licensing has encouraged and fostered the development and growth of hundreds of small businesses--such as Luczak's--which satisfy the public's demand for radio dispatch services, at an affordable cost. Moreover, the SMR industry of today serves the needs of hundreds of thousands of customers, many of whom are small businesses themselves, and all of whom are dependent on the services that SMR operators provide.

The Commission has indicated that its primary goal in this proceeding is to "establish a flexible regulatory scheme for 800 MHz services that will allow for more efficient licensing, eliminate unnecessary burdens on both existing and future licensees, and thereby enhance the competitive potential of SMR services in the mobile services marketplace."¹ Included in the Commission's articulated goal, is the desire to enable the SMR industry to better compete with the cellular and PCS markets. However, unlike the relatively new cellular and PCS industries, the SMR industry is well established and is close to complete maturation. SMR licensees have invested a great deal of time,

¹In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029 and Implementation of Section 309(j) of the Communications Act--Competitive Bidding 800 MHz SMR, PP Docket No. 93-253 (released November 4, 1994) at 4.

money, and energy in researching markets, procuring licenses, constructing facilities, and providing services to the public. Accordingly, the Commission must take into account the "big picture" when considering a restructuring of the SMR regulatory scheme of the magnitude proposed in this rule making, and must evaluate and justify such sweeping changes based on the SMR marketplace as it exists today, rather than re-examining obsolete models of twenty years ago.

In 1974, recognizing the public's need and demand for reliable and affordable radio dispatch communications, the Commission allocated spectrum in the 800 MHz band exclusively for SMR use. At that time, the Commission established a flexible, meaningful, and efficient regulatory scheme for SMR licensing. Since then, both the Commission and existing SMR licensees have worked together to bring about the well-oiled machine known today as the SMR licensing system. The Commission's aspirations for SMR have been achieved in large part and the SMR industry, under its current regulatory scheme, has been highly successful. The Commission's effective administration and fine record of SMR regulation, unlike other areas regulated by the Commission, has been a feather in its cap for years. One wonders why the Commission, given its grand success in the SMR field, now feels the need to re-invent the very same system it has so carefully crafted and perfected over the past twenty years. The Commission may be familiar with the old adage: "if it ain't broke, don't fix it." The Commission would do well to heed this advice in the current rule making, and not seek to fix that which is not broken.

Look Before You Leap

The Commission, in drafting its proposed changes, has largely ignored the rights of existing licensees--all of whom have relied on and faithfully abided by the SMR licensing rules that have existed for over twenty years--in favor of speculation of what might be possible through wide-area licensing. In 1991, the Commission granted an authorization to Fleet Call, Inc. for a wide-area ESMR system, based in part on Fleet Call, Inc.'s promise to build a land mobile system which improved spectrum efficiency, without the need for additional spectrum². The Commission also waived the requirements of Rule Section 90.631 and allowed Fleet Call, now Nextel Communications, Inc., five years to construct³. Yet, although Nextel has until 1996 to complete construction of its wide-area system, there is no guarantee that the system will ever be constructed or operational as is reflected in the applications and promises of Nextel that created its authority. Moreover, the neither the Commission nor Nextel has put forth any evidence that such a system is possible, let alone can and will be successful. How, then, can the Commission possibly reconcile its decision to re-work and re-create the SMR licensing system at this time based on nothing but sheer speculation of what might or might not be possible? Rather than leaping in with both feet and overhauling a regulatory scheme which has existed and proved successful for over twenty years, the Commission should instead refrain from implementing such major

²Fleet Call, Inc., *Memorandum, Opinion and Order*, 6 FCC Rcd. 1533 (1991), *recon. dismissed*, 6 FCC Rcd. 6989 (1991).

³Id.

changes in SMR licensing until after it has all of the facts necessary to make a careful evaluation of the successes and benefits, if any, of wide-area ESMR systems.

Balancing the Scales

The Commission's proposed changes to its current SMR licensing scheme are drastic, and, therefore, the needs of all parties affected by such changes must be considered. However, since the proposed changes, as presented in the *Further Notice of Proposed Rule Making*, clearly exhibit a prejudice against existing, traditional SMR licensees, and favor potential wide-area ESMR licensees, the Commission has tipped the scales in favor of the minority and against the majority. Accordingly, the weight given to the opinions and concerns expressed must be balanced so that both sides stand on a level playing field and a fair decision regarding this matter may be had.

The Commission has incorrectly and unfairly placed the burden of proof in this matter on existing SMR licensees, and Luczak submits that the burden of proof associated with implementing such sweeping changes lies not with the numerous opponents of change, but rather with its few proponents. The Commission should not require the hundreds of existing licensees who oppose the proposed new SMR licensing system to defend the current system. Instead, the Commission should require those favoring implementation of the proposed rules to provide clear, convincing, and conclusive evidence that the revised SMR licensing system is not only viable, but also necessary and justified. Only then will the Commission be able to properly weigh the evidence and determine whether or not the system should be changed.

Forced Frequency Swapping

The Commission has proposed the idea of forced frequency swapping in order to facilitate wide-area SMR licensing. In this scheme, a wide-area licensee may force an existing SMR licensee on an "old SMR" channel to "trade" their currently authorized channel for a substitute channel. Once again, the Commission is acting to benefit the well-financed minority at the expense of the majority without giving any real thought to the effect of its actions on existing, traditional SMR licensees. What the Commission proposes will aid only ESMR licensees and largely ignores the needs of hundreds of existing SMR licensees, many of whom have been a part of the SMR industry since its inception and have enabled it to flourish. Licensees, such as Luczak, have spent time and money researching potential locations and frequencies, procuring licenses, and constructing their stations, all with the intent of providing radio communications services to the public for years to come. Moreover, many existing SMR licensees fashioned their current systems in such a way that system expansion, should it prove desirable, would be feasible and convenient.

Forced frequency swapping, however, places an enormous burden on these existing licensees. Many current SMR licensees, such as Luczak, are small or local operators who would be forced to surrender their frequencies to the bigger operators of ESMR systems. Thus, the small or local operator is placed in the lose-lose position of either fighting a costly and likely losing battle to retain his/her authorized frequency, or simply giving it up. The small or local operator will then be left with a frequency that

has been deemed by the Commission to be a sufficient swap, regardless of whether the existing licensee agrees.⁴

Even if it can be shown that frequencies may be swapped in such a way that an existing licensee is provided with a sufficiently satisfactory alternate frequency, the Commission has failed to consider the additional burdens and problems associated with changing one's frequency. First, the existing licensee will have to modify his/her license to reflect a change in frequency. This will cost both the licensee and the Commission time and money. After the frequency is changed, the existing licensee will then have to notify each customer currently utilizing the old frequency that there is now a new frequency. Customers will need to bring their mobile equipment to the licensee to have it changed out and retuned. The cost of this procedure will, again, be borne by the existing licensee. Some customers may find the change out and retuning process to be inconvenient, and may elect to cancel their service altogether. Thus, the small or local operator stands to lose twice--first from the cost of changing out and retuning, and again from the threat of lost business. The costs which stem from frequency swapping, with respect to both time and money, are far too high to be imposed solely on the existing licensee.

Nor can these costs be adequately offset by illusory promises of assistance from ESMR operators. No ESMR operator has stated a willingness or has demonstrated an

⁴ There exists substantial doubt as to whether "fully comparable" frequencies exist to facilitate such swaps and Lucak respectfully requests clear evidence that such spectrum is available prior to any consideration of this proposal.

ability to bear the actual costs associated with changing out the hundreds of affected systems and the associated hardware. Most significant, perhaps, is the lack of an offer by ESMR operators to pay the full value of the diminution of the value of the traditional SMR operators' businesses and assets resulting from the frequency exchange.

What the Commission must also recognize is that its proposal regarding forced frequency swapping will not only up-root the very licensees who have made the SMR industry into what it is today, but will also stifle the potential for future growth of their systems. Frequency swapping will cost the small or local operator dearly, which will in turn have a stifling effect on the growth of small business, as resources are diverted to accommodating frequency change and not invested in growth and development. As the Commission has always had an underlying goal of encouraging the development of small businesses, the Commission would be well advised not to institute a system of required frequency swapping as it will, in fact, serve only to hinder the progress of small business.

Remember the Public Interest

The Communications Act of 1934, as amended, requires the Commission to act "in the public interest, convenience, and necessity." Luczak, however, submits that the Commission, by its proposed redesign of the SMR regulatory scheme, is doing the exact opposite. The Commission's revised SMR licensing system is clearly detrimental to existing licensees, particularly small and local operators, such as Luczak, and will benefit a only few at the expense of hundreds. Moreover, the Commission has unfairly shifted

the burden of proof regarding this matter to the wrong parties. These actions are clearly not in the public interest. The public is interested in dependable and affordable dispatch communications services. The public has not demanded ESMR service. Rather, it has, with a few exceptions, overwhelmingly rejected it. Accordingly, the public interest will surely suffer rather than benefit if the Commission's proposals are adopted.

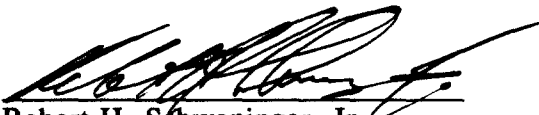
The Commission cannot, in good conscience, promulgate the current rule making under the auspices of acting in the public interest. The public, through this opportunity for comment, will likely summarily reject the Commission's proposal. The Commission should respect the public's wishes, and be mindful of the public's response in making its final determination. Only then will the Commission have fulfilled its mandate to act in public interest, convenience and necessity.

Conclusion

For all the forgoing reasons, the Commission should decline to adopt its proposed SMR licensing system since there exists no legal purpose or factual basis for adoption; and since adoption will cause substantial interest to the public and small businesses.

Respectfully submitted,
THOMAS LUCZAK

By


Robert H. Schwaninger, Jr.

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

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